APPEAL NO. 93409

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on March 10, 1993, before hearing officer (hearing officer), to determine the following issues: how certain Veterans Affairs (VA) benefits should be considered in determining the claimant's pre- and postinjury wages; whether a reduction in claimant's postinjury wages due to the receipt of VA benefits would cause him to be entitled to temporary income benefits (TIBS); and whether claimant lost earnings in his postinjury employment for which he should be paid TIBS. The hearing officer held that the second and third issues had already been determined in a prior contested case hearing and decision of the Appeals Panel. He also held that the VA benefits are not wages paid to the claimant and thus are not included in the calculation of average weekly wage (AWW), and that since they are not earnings they are not included in the claimant's earnings after the injury in the calculation of TIBS.

The appellant, hereinafter claimant, maintains in his appeal that he is entitled to TIBS on the difference between his preinjury wage and his postinjury earnings. He also contends that the hearing officer did not consider certain evidence regarding disability; that statements of the hearing officer indicate that he had decided the outcome of the case prior to the hearing; and that one of carrier's exhibits--the hearing officer's decision in a prior case--was not provided to him. The respondent, hereinafter carrier, responds to each of claimant's points on appeal, and essentially argues that the issues in this case have been decided by prior decisions, which are *res judicata*.

DECISION

We affirm the hearing officer's decision and order.

It was not disputed that the claimant was employed by the Veterans of Foreign Wars (employer) on (date of injury), and that he suffered a compensable injury on that date. This claim has been the subject of two prior contested case hearings (CCH), which are summarized herein.

In November of 1990 the claimant wrote to (Mr. G), employer's state adjutant-quartermaster, seeking employment as a service officer. Mr. G responded that there currently was no such position available, although there was a possibility of such a position opening in Houston upon the retirement of another individual. In January 1991, claimant was offered a mobile service officer position based out of Austin, with the understanding that claimant would have first option on the Houston service officer position when such became available.

According to an August 8, 1991, letter from Mr. G, claimant's base salary for the mobile service officer job was $18,000, plus $2,000 additional per year for driving the service officer van, plus $15.00 per diem to cover his meals since he was required to live

in the van away from home. On July 21, 1991, Mr. G said, claimant's base salary was raised to $20,000, which was paid by the following formula: $14,516 was paid by employer, through a regular paycheck, and $5,484 was to be paid to claimant over a 12 month period as "Title 31 OJT money." The claimant testified at the hearing that he and employer filed a joint application for approval of funds under this federal vocational rehabilitation program, which he said provided subsistence directly to a disabled veteran and allowed employers to hire the veteran at reduced wages. Mr. G's letter characterized this payment as "actually reimbursement to the employer for hiring an employee."

On May 9, 1991, the claimant accepted the Houston service officer position at a salary of $20,000 (due to a lack of cost effectiveness, the Austin mobile service officer position was eliminated on July 31st). Because claimant's doctor had released him to work with certain restrictions, such as no heavy lifting, stooping, bending, or twisting, and no prolonged periods riding in a vehicle, employer accommodated these needs in the Houston job by allowing him to use only the top drawers of filing cabinets and giving him breaks as needed, with no prolonged sitting.

The first CCH determined that the fair market value of claimant's use of the van provided by the employer in the mobile service officer job in which he was injured was part of his AWW (the parties stipulated that the value of the van, including per diem, was $50 per day). Claimant was off work, and was paid TIBS, for the periods May 1 through 8, August 12 through September 2, 1991, and September 3 through 15, 1991. The amount of TIBS, he maintained in the instant case, was based upon his salary from employer and did not include any amounts from the VA. Claimant's contention at this hearing was that if the amounts he received from the VA were not included as part of his preinjury AWW, they should not be used in computing his postinjury earnings for purposes of disability determination.

The second CCH involved the issue of whether the claimant suffered any loss of earnings due to reduction in salary arising out of his acceptance of the Houston job, as compared to his preinjury wage. An unpublished Appeals Panel decision, Texas Workers' Compensation Commission Appeal No. 92560, decided December 3, 1992, upheld the hearing officer's determination that claimant did not have disability, and thus was not entitled to TIBS, upon resuming employment at the Houston position. Citing the Act's definition of "disability" as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury," Article 8308-1.03(16), the Appeals Panel noted that entitlement to income benefits is not based upon an inability to return only to the type of work the employee was doing when injured, and thus the fact that claimant's doctor had not released him to the mobile van job was not a correct premise on which to base a finding of disability. While there was some evidence to the effect that the Houston job had been "modified" to accommodate claimant's physical restrictions, the Appeals Panel further found sufficient evidence upon which to affirm the

hearing officer's decision that the claimant accepted the Houston job voluntarily and pursuant to earlier agreement with the employer, rather than because of his injury. Because both Appeal No. 92560, and the decision and order in the underlying CCH, reached the conclusion that claimant did not have disability, it was not necessary that they address whether the VA benefits constituted postinjury earnings, although both noted that a portion of claimant's salary would be paid by the VA.

In his discussion of the history of the case, the hearing officer said that the decision in Appeal No. 92560, *supra*, "directly affects the answers to issues number 2 and 3 in this hearing . . . since claimant has no entitlement to [TIBS] after his acceptance of the Houston position on May 9, 1991, the question of how the reduction of his salary by the amount of any VA benefits affects his [TIBS] is moot. . . . With regard to Issue #3, the question is precisely the same issue decided in the [CCH] hearing and upheld by Appeals Panel Decision No. 92560. Since claimant took the Houston position voluntarily rather then because of his injury, any loss of earnings is not caused by claimant's inability to obtain and retain employment at a wage equivalent to the pre-injury job, and therefore he has no entitlement to [TIBS]." In addition, the hearing officer determined that claimant's VA benefits may not be considered in the determination of his AWW or to offset the amount of TIBS he may be due.

In his appeal, the claimant says the hearing officer's determination that he has no disability "clearly shows" the hearing officer did not consider claimant's exhibits concerning his release to restricted duty by his doctor. He also states, "I find that the prior Appeals Panel decision shows that I am not entitled to temporary income benefits because there was no loss of postinjury salary due to receipt of VA benefits being counted as part of the salary. However, now that it has been established that VA benefits are not to be counted as part of the salary; and I find the medical evidence clearly shows I was disable (sic); I find that I am entitled to temporary income benefits for the difference between pre injury and post injury wage."

The carrier in its response contends that the hearing officer has correctly held that the prior CCH decision and Appeal No. 92560 are *res judicata* to the issues involved in this case.

We agree with the hearing officer that any issue regarding postinjury wages with respect to the Houston job is moot because of the prior determination that claimant did not have disability while in this job.

The 1989 Act provides that an employee who has disability and who has not attained maximum medical improvement (MMI) is entitled to TIBS, which are payable at the rate of 70% of the difference between the employee's AWW and the employee's weekly earnings after the injury. Article 8308-4.23. While the record does not disclose

by what method the claimant's AWW was determined, it indicates that the first CCH determined that the value of the use of the van should be included as part of claimant's AWW for the mobile service officer job claimant held at the time of injury. We infer from the record before us that the issue of AWW was decided at the first CCH and, not having been appealed, became final. Article 8308-6.34(h).

The record further reflects that during the time periods in May, August, and September 1991 in which he was not able to work at all (see above), claimant received TIBS from the carrier. (Apparently this payment was based upon carrier's own determination that claimant had disability during this period of time, rather than upon any adjudication of the issue.) However, during the period of time the claimant actually was working at the Houston job, the issue arose as to whether the claimant suffered any loss of earnings due to the difference between his preinjury and postinjury wages. As noted above, and assuming an employee has disability and has not reached MMI, TIBS are paid on the difference between AWW and the employee's postinjury earnings. The hearing officer at the CCH, and the Appeals Panel on review, determined this issue by holding that the claimant did not have disability by virtue of the new job, and thus any comparison between AWW and postinjury earnings was irrelevant. We have not been made aware that the decision in Appeal No. 92560 was appealed, and we thus presume that it has become final under Article 8308-6.42(d).

This panel has previously ruled that disability is not necessarily a continuing status only, and that an employee may have disability followed by a period of no disability, only to have disability recur. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. Under the facts of the instant case, however, no changed circumstances have occurred upon which a hearing officer could have determined that disability had recurred. Instead, the claimant is attempting to assert additional arguments into a factual dispute which has already been decided; if the final decision in the dispute resolution process is that claimant does not have disability while working at the Houston job, any differential in his earnings because of the VA supplement would be moot. We thus affirm the hearing officer's determination on this point.

With regard to claimant's remaining points on appeal, our review of the record does not reflect that the hearing officer in any way prejudged this case. The 1989 Act imposes upon the hearing officer the duty to build a full and complete record, Article 8308-6.34(b), and it appears that the hearing officer's lengthy questioning of the parties in this case was done with intent to ensure that the record was clear with respect to the evidence and the arguments advanced. Claimant's argument that he was not provided with Carrier's Exhibit D (the decision of the hearing officer in the prior contested case hearing) is also without merit. The record does not show that the claimant objected to this exhibit when it was offered. Furthermore, there was no evidence that the claimant did not receive a copy of this decision when it was rendered; as the carrier points out in

response, this decision was the one appealed by claimant in Appeal No. 92560, *supra*.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge